No. 16,282

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

REXALL DRUG COMPANY, a corporation, and ARNOLD L. LEWIS, doing business as Studio Cosmetics Company,

Appellants,

vs.

SANDRA MAE NIHILL, a Minor, by Her Father and Guardian, JOHN NIHILL,

Appellee.

REPLY TO PETITION FOR REHEARING.

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TABLE OF AUTHORITIES CITED

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REPLY TO PETITION FOR REHEARING.

Since the respondents on this petition for a rehearing stand in the same legal position, they join in this answer, rather than burden the court with two separate briefs.

Preliminarily it is submitted that no new material has been called to the attention of this court which was not *fully* explored in the prior briefs filed by both sides.

Appellee refuses to "face up" to the legal proposition long recognized in our courts, in *every jurisdiction,* that verdicts cannot rest upon *speculation, conjecture* and *surmise.*

The Supreme Court of the United States has had no difficulty in following this principle *through the years.*

Thus the Supreme Court of the United States, in affirming a ruling holding as a *matter of law,* that there was *no* liability in a negligence case, stated in *Moore Admr. v. Chesapeake & Ohio Ry. Co.,* 340 U. S. 573 at 578:

> "*Speculation* cannot supply the place of proof." (Emphasis added.)

In a very recent case the Supreme Court of the State of Washington in the case of *Bland v. King County* (Wash.), 342 P. 2d 599 (1959), was called upon to pass on the *identical point* decided by *this* court. The question was whether a certain injury had caused the death of decedent. The medical testimony was strikingly similar to the case at bar.

The court sets forth part of the testimony of one of the expert doctors as follows: (P. 600.)

> "In answer to a hypothetical question, Dr. Pace stated: Well, I think my opinion, as a matter of opinion, would be, that if a period of ten hours delay existed from the period of receipt of trauma and medical attention, I think there is a *very excellent possibility* of this being considered a trigger mechanism, or the initialing situation, *that might evolve* in the actual death itself. And to clarify that, I would say simply this, a period of delay and inattention to a condition like a fracture *we can assume the probability* that in a man of this nature that this *very probably could* cause a drop in blood pressure and that a drop of blood pressure prolonged over this period of time *could be a very excellent probable cause* of initiating the mechanism that resulted in his demise." (Emphasis ours.)

With respect to this testimony the court concluded as a *matter of law* that there was *no* causal connection shown between the decedent's death and his injuries, *which was sufficient to submit to a jury.*

The court stated at page 601;

"'It appears to be well settled that medical testimony as to the possibility of a causal relation between a given accident or injury and the subsequent death of impaired physical or mental condition of the person injured is not sufficient, standing alone, to establish such relation. By testimony as to possibility is meant testimony in which the witness asserts that the accident or injury "might have," "may have," or "could have" cause, or "possibly did" cause the subsequent physical condition or death or that a given physical condition or death or that a given physical condition (or death) "might have," "may have" or "could have" resulted or "possibly did" result from a previous accident or injury—testimony, that is, which is confined to words indicating the possibility or chance of the existence of the causal relation in question and does not include words indicating the probability or likelihood of its existence.'

"In Anton v. Chicago, M. & St. P. R. Co., 92 Wash. 305, 159 Pac. 115, this court expressed its views with respect to such evidence, in the following language:

"'Taking the opinion of the witness [a medical man] for the appellant, as quoted above, at its full worth, we think it is no more than a statement of a possibility or possibly a probability, more or less remote, that the tuberculosis is a result of the injury. This is not enough. The law demands that verdicts

> rest upon testimony and not upon conjecture and speculation. There must be some proofs connecting the consequence with the cause relied upon. The testimony, whether direct or circumstantial, must reasonably exclude every hypothesis other than the one relied on.' "

The same test was recently applied in *Sawyer v. Department of Labor and Industries,* 48 Wash. 2d 761, 766, 296 P. 2d 706 (1956).

Dr. Pace testified that the fractures *could* have produced a decrease in blood pressure, and that the decrease in blood pressure *could* have been a contributing cause of decedent's death. The doctor's testimony is, as we said of Dr. Benson's testimony in the *Sawyer* case, *supra* [p. 767], "assumption pyramided upon assumption, amounting to mere speculation and conjecture."

> "Applying the rule announced in the cited cases to the facts presently before us, we conclude that any finding by the jury that decedent's fall was a proximate cause of his death would be the result of speculation and conjecture, and that the court properly dismissed appellant's second cause of action."

It is submitted that *all* of the medical testimony in the case at bar, insofar as it relates to the issue of causation is of the same type as the testimony in the *Washington* case (*supra.*)

I.

There Is No Merit to the Suggestion That This Court Has Denied Plaintiff a Trial by Jury.

The Federal Rules expressly provide for orders which have the effect of declaring as a *matter of law,* that the evidence is insufficient to submit to a lay jury. The Rules expressly provide for judgments notwithstanding the verdict. The right to a trial by jury is a right long guaranteed, but this does *not* preclude a trial court or an appellate court from determining that plaintiff's proof has failed to meet *recognized legal standards.*

The Supreme Court has *many times* declared that as a *matter of law* no actionable negligence was shown.

See:

Moore Admr. v. Chesapeake & Ohio Ry. Co., 340 U. S. 573;

Brody v. Southern Ry. Co., 320 U. S. 476;

Eckenrode Admr. v. Pennsylvania Ry. Co., 335 U. S. 329 (No proximate cause shown as a matter of law.)

Petitioner has selected a handful of excerpts from the transcript which, rather than representing grounds for a rehearing, *fortify the decision of this court.*

Each and every one of these excerpts is subject to the same objection; they are either *meaningless* or fall squarely within the type of testimony that courts have uniformly *condemned* as having no probative value because they are speculative and conjectural.

For example: With reference to ammonium thioglycolate, C. E. P. Jeffers stated: "It has some toxicity. [Tr. p. 607; Pet. to Rehear. p. 2.] What possible relation existed between this testimony and the *cause* of the loss of appellee's hair is shrouded in speculation. Hundreds of commonly used preparations have "some degree" of toxicity like iodine, ammonia, etc., but cause no loss of hair.

Every doctor expressed an opinion, but as this court ably pointed out, their answers, insofar as the issue of causation was concerned, were speculative in *every instance.* Furthermore, this court will recall that ammonium thioglycolate is used in percentages varying from 3% to 20%; approximately 7% in the case at bar. APPELLEE'S COUNSEL IN NO INSTANCE EVER INCORPORATED IN ANY QUESTION POSED TO ANY OF HIS DOCTORS, THE PERCENTAGE OF THIOGLYCOLATE CONTAINED IN APPELLANT'S PRODUCT.

Dr. Martin's Testimony [pp. 314, 315, 316] falls squarely within the category of evidence that is *meaningless* and speculative. "Thus . . . this condition . . . *may well* have been due to a chemical irritant such as you mentioned . . ." (Pet. to Rehear. p. 3). Petitioner *omits* Dr. Martin's *qualifying* statements. He expressly stated: *"I have a qualified opinion"* [p. 314]. . . . "My opinion is that this loss of hair *may well* have been due to the home permanent, but certainly I do not feel it can be proved *for sure one way or the other."* [P. 314].

Dr. Melton's testimony (Pet. to Rehear. pp. 3 and 4) is likewise meaningless. Here again no *concentrates* were given to this doctor. He, at most, suggested that in *certain concentrations,* (not specified in either questions or

answers). . . . "It can be harmful in the sense that *other allergic* reactions can occur in concentrations that are used. Alopecia[1] *may* occur and toxic reactions have been reported." [pp. 336-337]. Even here it is interesting to note that as to the so called toxic reactions "there have been controversial studies or reports as to their exact nature." What possible probative value could this evidence have to any lay jury?

Dr. Levitt's testimony has been carefully analyzed by this court. Almost every piece of testimony mentioned by petitioner was cited to this court in the *original briefs* of the parties or was mentioned by this court in its opinion.

When all of the testimony is examined, one thing stands out predominantly: There was an *utter absence of any proof* indicating that the preparation in question was anything other than an ordinary home permanent wave solution, manufactured in accordance with the usual practice in the industry. There was not one scintilla of evidence to support the conclusion that there was any *causal* relationship between the particular product and the alleged loss of hair.

Dr. Levitt, to put it plainly, stated that "a" coldwave permanent *"could* have caused the original loss of hair." [P. 357]. He did not refer to a "home permanent" or a permanent with any *particular strength of solution of thioglycolate.* This doctor conceded that selsum, the prescription drug (obviously a chemical) applied to the appellee's head for *months* without supervision of *any sort,* had been reported in a few cases *as causing a loss of hair.*

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[1]He, nowhere in this answer refers to alopecic *totalis,* but rather to simple alopecia; *i.e.,* patchy loss of hair.

[P. 359]. His testimony was to the effect that in 25% of the cases alopecia areata was caused by *sudden* shock, and in the other 75% of the cases the cause was *unknown*. [Pp. 362-363.] The record is *absolutely devoid* of any evidence of sudden shock to the plaintiff. Even the hair loss was *not* sudden but took five to six months during *all* of which time appellee was applying a prescription drug and admittedly, according to Dr. Levitt, had *all* the ordinary symptoms of a thyroid gland *case,* which will *cause* loss of hair.

The possibility that the shock from the prospect of a basketball tournament would cause an alopecia was just as much a possible cause as anything else. [P. 364.]

II.

This Court Has Correctly Applied the Applicable Law.

It is urged that this court has failed to apply the law of *North Dakota,* citing *Burt v. Lake Region Flying Service,* 54 N. W. 2d 339. This case was discussed by *both* parties in the briefs already before this court.

Petitioner has *overlooked fundamental principles.* This court, in a diversity case, will look to North Dakota for the *substantive law,* but not for the *procedural law.*

The effect of evidence, the matter of inferences, presumptions, burden of proof and related matters *must* be determined by the law of the *forum,* to wit: California, and this court has unerringly set forth the *applicable* principles as they have been applied by the California courts and the petitioner *does not* claim to the contrary and *no* California authority is cited by petitioner contrary to the authorities relied upon by this court.

While the weight of evidence is for the trier of *fact,* it is always proper to refuse to submit a cause to a jury

where there is no evidence to submit to them *which is capable of being weighed.*

The two *North Dakota* cases cited by petitioner are clearly *not* in point in any event. The *Burt* case (*supra*) has already been discussed. The case of *Bergley v. Manns,* 99 N. W. 2d 849, is not in point. This was a typical *res ipsa loquitur* case, a *classical* case in fact, where a false front on a building collapsed, injuring the plaintiff. The court merely holds that the doctrine *res ipsa loquitur* was applicable. This is in clear accord with many similar California cases, but is wholly *unlike* the case at bar for the reasons heretofore pointed out in the opening brief of appellant Lewis. Clearly *no res ipsa loquitur* case was made out against *Lewis* for the reasons pointed out and no case was made out against Rexall for the reason that as this court has said, there was *no* proof of causal relationship between the product and the hair loss.

III.

The Contention That Full Faith and Credit Was Not Given to the Testimony of Certain Witnesses from North Dakota Is Without Merit.

No authority is cited by petitioner for this unique proposition.

Article IV, Section 1 of the Constitution of the United States provides:

> "Full Faith and Credit shall be given in each state to the *public acts, records and judicial proceedings* of every other state. . . ."

It is asserted that this court has referred to give "Full Faith and credit" to the testimony of the Carlsons given originally by deposit on in North Dakota. It is difficult

to understand petitioner's position in this connection. The depositions were given by citizens of North Dakota in *this* Federal Court proceeding. *There is no problem of "full faith and credit" involved.*

This court as well as the trial court was of the opinion, and it is submitted correctly so, that these depositions were inadmissible. Proper and full objections were made at the time of their introduction in evidence. The depositions could shed no possible light on this lawsuit, for the many reasons pointed out in the trial court and by this court in its opinion.

Conclusion.

It is respectfully submitted that the petition to rehear is without merit; raises no new points and should be denied.

Respectfully submitted,

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and

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